

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 WILLIAM MASON,

Civil No. 07-552-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
16 Tim Wilborn
17 Wilborn Law Office, P.C.
18 19093 S. Beaver Creek Road, PMB #314
19 Oregon City, Oregon 97045
20 Attorney for plaintiff

21 Karin Immergut
22 United States Attorney
23 District of Oregon
24 Britannia I. Hobbs
25 Assistant United States Attorney
26 1000 S.W. Third Avenue
27 Portland, Oregon 97204-2902

28 L. Jamala Edwards
Special Assistant U.S. Attorney
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
Attorneys for defendant

AIKEN, Judge:

Claimant, William Mason, brings this action pursuant to the
Social Security Act (the Act), 42 U.S.C. §§ 405(g) to obtain

1 judicial review of a final decision of the Commissioner denying
2 his application for disability insurance benefits under Title II
3 of the Act. For the reasons set forth below, the Commissioner's
4 decision is reversed and remanded for payment of benefits.

5 **PROCEDURAL BACKGROUND**

6 Plaintiff protectively filed his application for SSI
7 benefits on December 3, 2004. Tr. 55-59, Tr. 20. Plaintiff's
8 application was denied initially and upon reconsideration.
9 Plaintiff then requested a hearing before an Administrative Law
10 Judge (ALJ). On April 14, 2006, after a hearing before an ALJ,
11 the ALJ issued a decision finding plaintiff not disabled. Tr.
12 20-26. Plaintiff timely requested review by the Appeals Council.
13 However, on July 6, 2006, the Appeals council declined to grant
14 review. Tr. 12-14. This action resulted in the ALJ's decision
15 becoming the final Agency decision.

16 **STATEMENT OF THE FACTS**

17 Born in March 1947, plaintiff alleges disability beginning
18 July 15, 2004, at which time he was 57 years old. Tr. 55.
19 Plaintiff alleges disability based on combined impairments,
20 including low back disease/degeneration with associated pain and
21 limitation of function.

22 Plaintiff completed high school. Tr. 71. His past work
23 included president and secretary of his own business making
24 silicone parts for subcontract. Tr. 86.

25 **STANDARD OF REVIEW**

26 This court must affirm the Secretary's decision if it is
27 based on proper legal standards and the findings are supported by
28 substantial evidence in the record. Hammock v. Bowen, 879 F.2d

1 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
2 mere scintilla. It means such relevant evidence as a reasonable
3 mind might accept as adequate to support a conclusion."
4 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
5 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
6 The court must weigh "both the evidence that supports and
7 detracts from the Secretary's conclusions." Martinez v. Heckler,
8 807 F.2d 771, 772 (9th Cir. 1986).

9 The initial burden of proof rests upon the claimant to
10 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
11 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
12 an "inability to engage in any substantial gainful activity by
13 reason of any medically determinable physical or mental
14 impairment which can be expected . . . to last for a continuous
15 period of not less than 12 months. . . ." 42 U.S.C.
16 § 423(d)(1)(A).

17 The Secretary has established a five-step sequential
18 process for determining whether a person is disabled. Bowen v.
19 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
20 416.920. First the Secretary determines whether a claimant is
21 engaged in "substantial gainful activity." If so, the claimant
22 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
23 §§ 404.1520(b), 416.920(b).

24 In step two the Secretary determines whether the claimant
25 has a "medically severe impairment or combination of
26 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
27 §§ 404.1520(c), 416.920(c). If not, the claimant is not
28 disabled.

1 In step three the Secretary determines whether the
2 impairment meets or equals "one of a number of listed impairments
3 that the Secretary acknowledges are so severe as to preclude
4 substantial gainful activity." Id.; see 20 C.F.R.
5 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
6 presumed disabled; if not, the Secretary proceeds to step four.
7 Yuckert, 482 U.S. at 141.

8 In step four the Secretary determines whether the claimant
9 can still perform "past relevant work." 20 C.F.R.
10 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
11 disabled. If she cannot perform past relevant work, the burden
12 shifts to the Secretary. In step five, the Secretary must
13 establish that the claimant can perform other work. Yuckert, 482
14 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
15 (f). If the Secretary meets this burden and proves that the
16 claimant is able to perform other work which exists in the
17 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
18 416.966.

19 DISCUSSION

20 At step one of the five step sequential evaluation process
21 outlined above, the ALJ found that plaintiff had not engaged in
22 substantial gainful activity since his alleged disability onset
23 date. Tr. 22, Finding 2. This finding is not in dispute. At
24 step two, the ALJ found that plaintiff had the following severe
25 impairment: mechanical low back pain with no neurological
26 involvement. Tr. 22, Finding 3. This finding is not in dispute.
27 At step three, the ALJ found that plaintiff's impairments did not
28 meet or equal the requirements of a listed impairment. Tr. 23,

1 Finding 4. This finding is not in dispute.

2 The ALJ determined that plaintiff had the residual
3 functional capacity (RFC) to perform light work. Further, the
4 ALJ found plaintiff required an option to sit, stand, or lie down
5 at will, and was limited to no more than occasional kneeling.
6 Tr. 23. This finding is in dispute.

7 At step four, the ALJ found that plaintiff could perform
8 his past relevant work, as actually performed, as a president and
9 secretary of a corporation, which included duties as a molder
10 operator. Tr. 25, Finding 6. This finding is in dispute.

11 1. Residual Functional Capacity Finding

12 The ALJ found that plaintiff has the following capacities
13 and limitations: lift 20 pounds occasionally and 10 pounds
14 frequently; stand/walk for 6 hours of an 8-hour workday; sit for
15 6 hours of an 8-hour workday; requires an option to sit or stand
16 at will; limited to no more than occasional kneeling; and "[h]e
17 must have the option to lie down at will." Tr. 23.

18 In response to a hypothetical posed by the ALJ to a
19 Vocational Expert (VE) that included all of the above
20 capabilities and limitations, the VE testified that a person with
21 these limitations could perform plaintiff's past work as he
22 performed it, but that he could not perform the job as it
23 normally is performed in the economy. Tr. 226. Further,
24 assuming the same limitations, there would not be any other jobs
25 plaintiff could perform in the national economy. Id.

26 The VE's testimony and conclusion, however, is directly
27 contrary to the evidence. Plaintiff did not testify that he had
28 the option to lie down "at will" while performing his previous

1 job, and in fact the reason he had to ultimately stop working was
2 that his job, as performed, required too much "just staying in
3 one position." Tr. 217. Specifically, plaintiff's prior job
4 required him to sit and/or stand for certain periods of time, and
5 it was that requirement which led to his ultimate inability to
6 continue working. There can be no dispute that plaintiff's job
7 description did not allow him to lie down "at will." Tr. 68. It
8 was established that plaintiff's prior job had him walk, stand,
9 sit, stoop, crouch, crawl, and reach one hour per day. He also
10 had to handle small objects 6 hours per day. Id. These physical
11 requirements are not compatible with plaintiff's need to lie down
12 "at will."

13 Moreover, I find that the ALJ's RFC is contradictory.
14 While the ALJ found plaintiff able to stand/walk for 6 hours of
15 an 8-hour workday and sit for 6 hours of an 8-hour workday, the
16 ALJ also found that plaintiff "must have the option to lie down
17 at will." The ability to lie down "at will" necessarily includes
18 the ability to lie down for more than 2 hours per day. The
19 capacity to sit/stand/walk for 6 hours per work day is
20 incompatible with the ability to lie down "at will," because if
21 a person is lying down for more than 2 hours, he is not
22 sitting/standing/walking.

23 In sum, accepting the ALJ's residual functional capacity
24 finding, it is established that plaintiff cannot perform his past
25 work due to his need to "lie down at will," and no jobs exist in
26 the national economy that allow a person to lie down at will.
27 Therefore, plaintiff's disability is established. The ALJ's
28 decision is reversed because it was based on improper legal

standards. See Benecke v. Barnhart, 379 F.3d 587 (9th Cir. 2004) (reversing and remanding for an award of benefits when it was clear from the evidence that the claimant was disabled).

2. Plaintiff's Credibility

The ALJ determined that plaintiff's statements concerning his limitations were not entirely credible based upon "plaintiff's lack of supporting objective evidence, and his active lifestyle." Def's Brief, p. 5.

When a claimant has medically documented severe impairments that could reasonably be expected to produce some degree of the symptoms complained of, "the ALJ may reject his testimony regarding the severity of symptoms only if he makes specific findings stating clear and convincing reasons for doing so." Smolen v. Chater, 80 F.3d 1273, 1281-82 (9th Cir. 1996) (internal quotation omitted). Further, if the "ALJ's credibility finding is supported by substantial evidence in the record, we may not engage in second-guessing." Thomas v. Barnhart, 278 F.3d 947 (9th Cir. 2002). Where, as here, there is no evidence of malingering, the ALJ must provide clear and convincing reasons to reject plaintiff's testimony. See Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996). Further, the ALJ must identify specific evidence which shows that specific testimony is not credible. Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

The ALJ asserts that plaintiff took only Advil and Tylenol to relieve pain while working. The evidence is otherwise. Plaintiff took the prescription pain reliever, Naproxen, while working in 2004, and shortly after he stopped working he took the prescription medication, Celebrex. Both medications were taken

1 due to the ineffectiveness of non-prescription medications to
2 control his pain. Tr. 165, 171. The ALJ next relies on
3 plaintiff's activities of daily living to discredit his symptom
4 testimony. However, the evidence clearly shows that plaintiff
5 engages in those activities ranging between one to five minutes
6 per activity. The ability to perform an activity for 1 minute or
7 even 5 minutes does not equate with the ability to perform
8 substantial gainful activity and sustained employment. Fair v.
9 Bowen, 885 F.2d 597 (9th Cir. 1989). See also, Vertigan v. Halter,
10 260 F.3d 1044, 1049-50 (9th Cir. 2001). Finally, regarding
11 plaintiff's ability to walk, it is documented that it is easier
12 (less painful) for plaintiff to walk than to sit or stand.
13 Plaintiff's past job, however, was performed within the confines
14 of a small room, and primarily required sitting or standing. The
15 ability to walk does not translate to an ability for plaintiff to
16 perform his past job as it cannot be performed primarily while
17 walking around.

18 I find that the ALJ failed to provide clear and convincing
19 reasons for discrediting plaintiff's testimony. Therefore,
20 plaintiff's testimony is credited as a matter of law, and
21 plaintiff is found disabled. See Lester v. Chater, 81 F.3d 821,
22 834 (9th Cir. 1995) ("where the ALJ improperly rejects the
23 claimant's testimony regarding his limitations, and the claimant
24 would be disabled if his testimony were credited, 'we will not
25 remand solely to allow the ALJ to make specific findings regarding
26 that testimony.' Rather, that testimony is also credited as a
27 matter of law.") (internal citation omitted).

28 ///

1 **CONCLUSION**

2 The Commissioner's decision is not based on substantial
3 evidence, and is therefore, reversed and remanded for payment of
4 benefits.

5 IT IS SO ORDERED.

6 Dated this 26 day of February 2008.

7
8
9
10 /s/ Ann Aiken
11 Ann Aiken
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28